

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 27, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2016AP1828-CR
2016AP1829-CR**

**Cir. Ct. Nos. 2015CF957
2015CF1107**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ATAVIA JOY PRICE,

DEFENDANT-APPELLANT.

APPEALS from judgments and orders of the circuit court for Brown County: TAMMY JO HOCK, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Atavia Price appeals judgments of conviction, entered upon her no contest pleas, convicting her of robbery with use of force, possession of tetrahydrocannabinol (THC), bail jumping, and theft of movable property. Price also appeals the orders denying her postconviction motions for sentence modification. Price argues the circuit court erroneously exercised its sentencing discretion by imposing an excessive sentence and relying on a “speculative and irrelevant” factor. We reject Price’s arguments and affirm the judgments and orders.

BACKGROUND

¶2 Price’s convictions stem from two separate incidents. The first incident occurred in a restroom at the Oneida Casino in Green Bay, Wisconsin. Price pepper sprayed another patron, D.J., grabbed D.J.’s purse, and fled the scene. Price returned to the casino later the same day and was recognized by staff. She was arrested and charged in Brown County case No. 2015CF957 with robbery with use of force, battery, disorderly conduct, and possession of THC.¹ The second incident occurred while Price was on bond in the previously charged case. Price went to the Brown County Courthouse to drop off a letter related to a case in which Price was a victim. When she arrived at the office of the judge’s assistant, L.P., the office was empty, and Price stole L.P.’s purse from under the desk. An officer later recognized Price from surveillance footage of the courthouse incident,

¹ While the complaint in Brown County case No. 2015CF957 did not contain repeater allegations, Price agreed to plead no contest to the robbery and possession charges, both as a repeater.

and Price was ultimately charged in Brown County case No. 2015CF1107 with bail jumping, theft and obstructing an officer, all as a repeater.

¶3 Price agreed to plead no contest to the robbery with use of force and possession of THC charges (both as repeaters) in case No. 2015CF957 and to the bail jumping and theft charges in case No. 2015CF1107. In exchange, the State agreed to recommend that the circuit court dismiss and read in the remaining charges and dismiss the repeater allegations on the felony bail jumping and theft charges. On the robbery charge, the circuit court imposed a sentence of seven years, consisting of four years' initial confinement and three years' extended supervision. On the possession of THC charge, the court imposed a concurrent sentence of two years, consisting of eighteen months' initial confinement and six months' extended supervision. The court withheld sentence and placed Price on three years' probation on the felony bail jumping charge, consecutive to the sentences imposed on the robbery and possession of THC charges. On the theft charge, the court withheld sentence and placed Price on two years' probation, concurrent with the probation imposed on the felony bail jumping charge.

¶4 Price moved for postconviction relief in both cases, arguing that the circuit court erroneously exercised its sentencing discretion by imposing an excessive sentence based on a "speculative and irrelevant" factor. Price's argument focused on the court's comments during sentencing about Price's increased risk of her victimization and re-offense due to the negative impact of her relationship with her husband. The court denied Price's postconviction motions. This appeal follows.

DISCUSSION

¶5 Price presents essentially the same argument on appeal as in her postconviction motions. It is a well-settled principle of law that a circuit court's sentencing determination is discretionary. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. Our review is limited to determining whether the circuit court erroneously exercised its sentencing discretion. *Id.* In exercising discretion, sentencing courts must individualize the sentence to the defendant based on the facts of the case by identifying the most relevant factors and explaining how the sentence imposed furthers the sentencing objectives. *State v. Harris*, 2010 WI 79, ¶29, 326 Wis. 2d 685, 786 N.W.2d 409.

¶6 Courts must consider three primary factors in determining the appropriate sentence: the gravity of the offense; the defendant's character; and the need to protect the public. *Id.*, ¶28. Sentencing courts may consider additional, related factors, including:

- (1) Past record of criminal offenses; (2) history of undesirable behavior pattern; (3) the defendant's personality, character and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant's culpability; (7) defendant's demeanor at trial; (8) defendant's age, educational background and employment record; (9) defendant's remorse, repentance and cooperativeness; (10) defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention.

Id.

¶7 The circuit court erroneously exercises discretion when it bases a sentence on clearly irrelevant or improper factors. *Gallion*, 270 Wis. 2d 535, ¶17.

The defendant must prove by clear and convincing evidence that the court relied upon an improper factor. *Harris*, 326 Wis. 2d 685, ¶34.

¶8 In addition, a circuit court may modify a sentence if it determines that the sentence is unduly harsh or unconscionable. *State v. Cummings*, 2014 WI 88, ¶71, 357 Wis. 2d 1, 850 N.W.2d 915. “A sentence is unduly harsh or unconscionable only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.” *Id.*, ¶72 (internal quotation omitted).

¶9 As an initial matter, Price’s sentence was not excessive on its face because it was well within the limits of the maximum possible sentence. *See State v. Daniels*, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983). On the robbery charge alone, a Class E felony, Price faced a maximum possible term of imprisonment of fifteen years, with a maximum term of initial confinement of ten years. *See* WIS. STAT. §§ 939.50(3)(e), 943.32(1)(a), 973.01(2)(b)5. Due to the repeater enhancer, Price faced an additional two years, bringing the maximum for the robbery charge to seventeen years. WIS. STAT. § 939.62(1)(c). As to the other charges, Price faced an additional nine years and three months of imprisonment, with a maximum initial term of confinement of six years and three months.² “A

² On the possession of THC charge, Price faced a maximum term of imprisonment of six months, with an additional two years for the repeater designation. *See* WIS. STAT. §§ 961.41(3g)(e), 939.62(1)(a). On the felony bail jumping charge, a Class H felony, Price faced a maximum term of imprisonment of six years, with a maximum term of initial confinement of three years. *See* WIS. STAT. §§ 946.49(1)(b), 939.50(3)(h), 973.01(2)(b)(i). On the theft charge, a Class A misdemeanor, Price faced a maximum possible term of imprisonment of nine months. *See* WIS. STAT. §§ 943.20(1)(a), (3)(a), 939.51(3)(a).

sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.” *Daniels*, 117 Wis. 2d at 22.

¶10 Moreover, the record shows the circuit court properly exercised its sentencing discretion. The court considered proper factors, including the seriousness of the offenses, the impact on the victims, Price’s character, and the need to protect the public. *See Harris*, 326 Wis. 2d 685, ¶29. The court stated that “these offenses are incredibly serious, particularly the robbery offense.” The court noted D.J. sustained an eye injury from the incident at the casino, which lasted well after the robbery and required an emergency room visit. The court also highlighted that Price committed this crime just three days after being discharged from probation, which showed Price “simply did not learn anything from being on probation supervision.” Regarding the courthouse incident, the court noted that Price committed the theft while she was on bond, she stole a significant amount of cash from L.P., and she initially attempted to blame her sister for the theft when confronted by police. The effect on both victims was “significant,” and both of them reported a loss of their sense of security due to Price’s actions.

¶11 The circuit court expressed concern regarding the need to protect the public, and as it addressed the seriousness of the crimes and impact on the victims, it noted Price’s “incredibly dangerous, incredibly bold behavior,” and the number of and frequency of Price’s offenses. The court also stated that it could not tolerate Price’s taking advantage of other people, despite her background and struggles.

¶12 In considering Price's character, the circuit court weighed a number of factors, including the abuse and other unfortunate circumstances Price suffered as a child, her positive work history and education, her history of mental health issues and drug problems, and her desire to participate in treatment. The court also considered Price's relationship with her husband, noting that he was in prison for assaulting Price at the time of the sentencing hearing. The court expressed concern about Price's intention to return to a relationship with her husband upon his release from prison, given that "[t]hey were both actively using [drugs] at the time they were together and Mr. Price seriously assaulted the Defendant in front of the children." Immediately following this statement, the court went on to say, "But I think more importantly what the [c]ourt has to consider is these offenses, how serious they are, the significant impact that they've had on the victims, your character as I've already discussed it, and a need to protect the public."

¶13 Price contends the circuit court erroneously exercised its discretion in considering the possibility of her reuniting with her husband and the likely results of doing so because those matters were speculative and irrelevant. We disagree. Price herself indicated this desire to the agent completing her presentence investigation; therefore, her intent to reunite, at the very least, was not speculative. The nature of Price's future relationship with her husband was not irrelevant because, as the court stated, he was an individual with whom Price abused drugs and who had "seriously assaulted [Price] in front of the children," thus indicating an increased risk for Price's re-offense and victimization. The court could reasonably conclude that Price's drug use contributed to her behavior, and therefore reuniting with her husband, with whom she had used drugs, was problematic and placed her at risk for re-offense.

¶14 The circuit court clarified in its orders denying Price's postconviction motions that its intent in raising the issue of Price's relationship with her husband, as well as her past and upbringing, was in regards to Price's character, which is a relevant factor. However, the record clearly reflects the court did not impermissibly rely on this factor to justify the imposition of a more severe sentence as during the sentencing hearing, the court explained that it gave greater weight to other factors. *See State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994) (the circuit court may clarify statements it made during sentencing when a defendant challenges the court's exercise of its sentencing discretion). The passage related to Price's desire to reunite with her husband, when read in context, demonstrates that the court sentenced Price for the choices she made in victimizing other people, not for her relationship with her husband.

By the Court.—Judgments and orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

